Tung Ah Leek & Anor v Perunding DJA Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D5–22–1570 OF 2002
RAMLY ALI J
23 APRIL 2004

Companies and Corporations — Memorandum of association — Construction of object clauses — Complaints against majority rule — Whether company intended to be single purpose company — Functions of memorandum and articles of association — Rights to profits of company — Whether prerogative of company alone

Companies and Corporations — Shares — Increase in share capital — Decision of majority to increase share capital — Whether court should interfere with decision of majority

Companies and Corporations — Winding up — Procedure — Wrong process and mode of application — Petition to wind up the form of writ and application for interlocutory injuction — Whether relief of winding up should be granted

Civil Procedure — Injunction — Application for interlocutory injunction — Whether interlocutory injunction should be refused when damages adequate remedy

The first defendant was incorporated as a private limited company with initially four shareholders namely first plaintiff, second plaintiff, third defendant and fourth defendant. The second, fifth, sixth, and seventh defendants became shareholders of the first defendant after the incorporation. The sixth and seventh defendants were holding shares on trust for the eighth defendant. The ninth and tenth defendants were the secretaries of the first defendant. The first defendant's memorandum and articles of associations (M & A) states that the first defendant's principal activities are 'building and road construction contractors, builders, carpenters, general decorators, civil, electrical and mechanical engineering'. The second defendant was awarded a contract by Jabatan Kerja Raya, Selangor (JKR) (main contract). The second defendant had subcontracted the Main Contract to the first defendant. The first plaintiff, at all material times, was the managing director of the first defendant. The first plaintiff and second plaintiff were directly involved in the day to day running of the entire project. The first plaintiff was also appointed the first defendant's site agent with the second plaintiff as his assistant. The first plaintiff and second plaintiff were removed from their respective positions as managing director and site agent (first plaintiff) and assistant site agent (second plaintiff) sometime in March 2002. By the statement of claim dated 24 September 2002 the plaintiffs' claim in brief, against the defendants was one based on the tort of conspiracy by the defendants and breach of agreement by the third to seventh defendants to deprive the plaintiffs of their share in profits to be earned by the first defendant from the said project. The plaintiff contended that the said project was duly completed and the profits due, which the plaintiff anticipate were in the region of RM20 million, should be

distributed based on their ratio of shares in the first defendant. The plaintiffs were afraid that the defendants would dissipate the monies and deprive the plaintiffs of their shares. The plaintiffs also claimed that there was an understanding that the first defendant company was a partnership between the shareholders and that the company was a single-purpose company and was to be wound-up after completion of the project. The plaintiffs filed a writ against the defendants and further filed for an interlocutory injunction and subsequently filed for a second interlocutory injunction praying for among others *inter alia* that: (1) the first defendant be wound up and provisional liquidator be appointed; (2) the defendants be restrained from dealing with the monies they received, receiving or will receive for the main project without the permission of the plaintiffs; and (3) the defendants be restrained from taking any action to alter the equity of the first defendant company by increasing paid up capital. The plaintiffs also claimed that they had personal right to profit in the first defendant company.

Held, dismissing the plaintiffs' applications with costs:

(1) The M & A is considered as 'common law' of the company and one of the most fundamental principles is that 'the majority rules'. Where the parties have agreed to abide by the terms contained in the M & A, the minority cannot complain on the majority rule. If there was such an agreement that the first defendant company was a single-purpose company and was to be wound-up after completion of the project then such understanding or agreements should have been categorically incorporated in the M & A right from beginning during its incorporation (see para 11).

(2) The plaintiffs being the minority shareholders in the first defendant company had in actual fact brought a winding-up petition in a form of a writ and on application for interlocutory injunction. The actual mode that should be employed by the plaintiffs and the proper process should be in the form of a petition under s 181 of the Companies Act 1965. Hence the very form and procedure employed by the plaintiff was wrong and the injunctions sought cannot be granted by this court, as the mode employed was not provided by the rules (see para 18).

(3) The plaintiffs also claimed that they had personal right to profits in the first defendant company. The court was of the view that all earnings of the first defendant company were property of the first defendant company and it was the prerogative of the first defendant company how this property or profits of the first defendant company be dealt with (see para 19).

(4) If the majority of the shareholders have decided to increase the paid up capital of the first defendant company for reasons best suited the first defendant company, then the court should be slow to interfere unless there were elements of oppression, fraud or conspiracy (see para 25).

(5) The application for the increase in the paid up capital of the first defendant could proceed. To stop the first defendant company from calling for an increase in the paid up capital, when the shareholders and the board of directors have agreed, would not be in the interest of the company (see para 32).

(6) After going through all the issues raised by the plaintiffs in support of their applications the court was satisfied that those issues were not triable issues. Even if the issues were considered triable issues, the court was satisfied that interlocutory injunction should not be granted on the ground that damages in the form of financial remedy as claimed by the plaintiffs, would be adequate remedy recoverable at common law (see paras 33 and 34).

[**Bahasa Malaysia summary**

Defendan pertama ditubuhkan sebagai sebuah syarikat sendirian berhad dengan empat pemegang saham pada mulanya iaitu plaintif pertama, plaintif kedua, defendan ketiga dan defendan keempat. Defendan-defendan kedua, kelima, keenam dan ketujuh menjadi pemegang saham defendan pertama selepas penubuhan tersebut. Defendan-defendan keenam dan ketujuh memegang saham atas amanah untuk defendan kelapan. Defendan-defendan kesembilan dan kesepuluh merupakan setiausaha defendan pertama. Memorandum dan artikel penubuhan (M & A) defendan pertama menyatakan bahawa aktiviti utama defendan pertama adalah 'building and road construction contractors, builders, carpenters, general decorators, civil, electrical and mechanical engineering'. Defendan kedua diawardkan satu kontrak oleh Jabatan Kerja Raya, Selangor (JKR) ('kontrak utama'). Defendan kedua telah memberi subkontrak kontrak utama kepada defendan pertama. Plaintif pertama, pada setiap masa matan, adalah pengurus urusan defendan pertama. Plaintif pertama dan plaintif kedua secara langsung terlibat dalam pengendalian harian keseluruhan projek. Plaintif pertama juga dilantik sebagai ejen projek kepada defendan pertama dan plaintif kedua sebagai pembantu beliau. Plaintif pertama dan plaintif kedua digugurkan daripada jawatan masing-masing sebagai pengarah urusan dan ejen projek (plaintif pertama) dan pembantu ejen projek (plaintif kedua) sekitar bulan Mac 2002. Melalui pernyataan tuntutan bertarikh 24 September 2002, tuntutan plaintif secara ringkas, terhadap defendan adalah berdasarkan tort konspirasi oleh defendan dan perlanggaran perjanjian oleh defendan-defendan ketiga hingga ketujuh untuk menafikan plaintif-plaintif syer mereka dalam keuntungan yang diperoleh oleh defendan pertama daripada projek tersebut. Plaintif berhujah bahawa projek tersebut telah pun siap dan memperoleh keuntungan, yang mana plaintif jangkakan dalam anggaran RM20 juta, yang patut diagihkan berdasarkan ratio syer-syer mereka dalam defendan pertama. Plaintif-plaintif bimbang defendan-defendan akan mengambil wang tersebut dan menafikan plaintif-plaintif syer-syer mereka. Plaintif-plaintif juga menuntut bahawa terdapat

akujanji bahawa syarikat defendan pertama adalah perkongsian antara pemegang-pemegang syer dan bahawa syarikat tersebut adalah syarikat satu tujuan dan akan digulung selepas selesai projek tersebut. Plaintif-plaintif telah memfailkan satu writ terhadap defendan-defendan dan seterusnya memfailkan satu injunksi interlokutori dan berikutan itu memfailkan injunksi interlokutori kedua memohon, antara lain, agar: (1) defendan pertama digulung dan penyelesai peruntukan dilantik; (2) defendan-defendan dihalang daripada menguruskan wang yang diterima, sedang diterima dan akan diterima untuk projek utama tanpa kebenaran plaintif-plaintif; dan (3) defendan-defendan dihalang daripada mengambil apa-apa tindakan untuk mengubah ekuiti syarikat defendan pertama dengan menambah modal berbayar. Plaintif-plaintif juga mendakwa bahawa mereka mempunyai hak persendirian terhadap keuntungan dalam syarikat defendan pertama.

Diputuskan, menolak permohonan plaintif-plaintif dengan kos:

(1) M & A dianggap sebagai 'common law' syarikat dan salah satu daripada prinsip utama adalah 'the majority rules'. Di mana pihak-pihak telah bersetuju untuk mematuhi terma-terma yang terkandung dalam M & A, pihak minoriti tidak boleh mengadu tentang peraturan majoriti. Jika memang terdapat perjanjian bahawa syarikat defendan pertama adalah syarikat satu tujuan dan akan digulung selepas projek tersebut maka akujanji atau perjanjian tersebut patut dimasukkan dalam M & A dari mula lagi semasa penubuhannya (lihat perenggan 11).

(2) Plaintif-plaintif yang merupakan pemegang syer minoriti dalam syarikat defendan pertama telah sebenarnya memohon satu petisyen penggulungan dalam bentuk satu writ dan permohonan untuk injunksi interlokutori. Cara sebenar yang patut digunakan oleh plaintif-plaintif dan proses betul patut dalam bentuk petisyen di bawah s 181 Akta Syarikat 1965. Oleh itu, bentuk dan proses yang digunakan oleh plaintif adalah salah dan injunksi-injunksi yang dipohon tidak boleh diberikan oleh mahkamah ini kerana cara tersebut tidak diperuntukkan dalam peraturan (lihat perenggan 18).

(3) Plaintif-plaintif juga mendakwa bahawa mereka mempunyai hak persendirian ke atas keuntungan dalam syarikat defendan pertama. Mahkamah berpendapat bahawa semua pendapatan syarikat defendan pertama adalah harta defendan pertama dan ia adalah hak syarikat defendan pertama bagaimana harta atau keuntungan syarikat defendan pertama digunakan (lihat perenggan 19).

(4) Jika majoriti pemegang syer telah memutuskan untuk menambah modal berbayar syarikat defendan pertama atas sebab-sebab yang sesuai untuk syarikat defendan pertama itu, maka mahkamah tidak patut campur tangan kecuali terdapat elemen-elemen penindasan, fraud atau konspirasi (lihat perenggan 25).

(5) Permohonan untuk menambahkan modal berbayar defendan pertama boleh diteruskan. Untuk menghalang syarikat defendan pertama daripada memohon penambahan modal berbayar tatkala pemegang-pemegang syer dan Lembaga Pengarah telah bersetuju, bukanlah demi kepentingan syarikat (lihat perenggan 32).

(6) Setelah meneliti semua persoalan yang ditimbulkan oleh plaintif-plaintif bagi menyokong permohonan mereka, mahkamah berpuas hati bahawa persoalan-persoalan tersebut tidak perlu dibicarakan. Walaupun persoalan-persoalan tersebut dianggap yang perlu dibicarakan, mahkamah berpuas hati bahawa injunksi interlokutori tidak patut dibenarkan atas alasan bahawa gantirugi dalam bentuk remedi kewangan sebagaimana dituntut oleh plaintif-plaintif adalah remedi yang mencukupi menurut 'common law' (lihat perenggan 33 dan 34).]

Notes

For a case on construction of object clauses, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 496.

For cases on winding up procedure, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1263–1264.

For cases on shares generally, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 708–832.

For cases on applications for interlocutory injunctions see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2472–2477.

Cases referred to

American Cynamid Co v Ethicon Ltd [1975] AC 369 (refd)
Beh Chun Chuan v Paloh Medical Centre Sdn Bhd & Ors [1999] 3 MLJ 262 (folld)
Ebrahim v Westbourne Galaries Ltd [1973] AC 360 (refd)
Tuan Haji Ishak bin Ismail v Leong Hup Holdings Bhd & other appeals [1996] 1 MLJ 661 (refd)

Legislation referred to

Companies Act 1965 s 181

Vijay Kumar Natarajan (Chan Siew Leong with him) (Kumar Jaspal Quah & Aishah) for the plaintiff.
Tuan Haji Sulaiman Abdullah (Stanley Sinnappen with him) (Vazeer Akhbar Majeed & Co) for the defendants.

Ramly Ali J:

GROUNDS OF JUDGMENT

[1] The plaintiffs filed a writ against the defendants (encl 1) and further filed for an interlocutory injunction (encl 4) for the following prayers:

1 (i) Suatu perintah interim agar defendan-defendan, dan setiap satu daripada mereka, secara peribadi atau melalui agen mereka, pengkhidmat mereka, pekerja mereka atau melalui apa cara lain juga, dihalang daripada berurusan dengan wang yang telah, sedang dan akan dibayar bagi projek tersebut kecuali defendan kedua mendapat 1% dari jumlah pembayaran oleh majikan bagi projek tersebut, tanpa kebenaran pihak plaintif-plaintif;

(ii) Suatu perintah agar plaintif pertama dijadikan signatori wajib bagi setiap cek yang dikeluarkan oleh defendan pertama.

2 Suatu perintah agar defendan kedua dengan serta-merta membayar segala jumlah wang berkaitan dengan projek tersebut yang telah, sedang dan akan diterima daripada majikan bagi projek tersebut, selain daripada 1% daripada jumlah pembayaran oleh majikan bagi projek tersebut.

3 Suatu perintah agar defendan pertama, ketiga hingga ketujuh dihalang sama ada secara peribadi atau melalui agen mereka, pengkhidmat mereka, pekerja mereka atau melalui apa cara lain juga daripada menyingkirkan plaintif-plaintif daripada Lembaga Pengarah defendan pertama.

4 Suatu perintah supaya defendan-defendan ketiga hingga keenam serta ketujuh dan kelapan dan kesembilan dan kesepuluh tidak menghalang plaintif-plaintif daripada meneliti dan mengambil segala rekod berkaitan dengan defendan pertama.

5 (i) Defendan pertama dibubarkan dengan liquidator yang dianggap sesuai dan suaimanafaat dilantik oleh mahkamah yang mulia ini;

Dalam alternatif

(ii) Penerima dan pengurus yang sesuai dan suaimanafaat dilantik oleh mahkamah yang mulia untuk mentadbir defendan pertama daripada 31Ogos 2002.

(The prayers in the writ included the above prayers and also included a prayer for damages).

[2] Subsequently the plaintiffs filed for the second interim injunction (encl 21) seeking the following prayer:

1 Suatu perintah interim agar defendan-defendan ketiga, keempat, keenam dan ketujuh setiap satu daripada mereka, sama ada secara peribadi atau melalui ejen mereka, pengkhidmat mereka, pekerja mereka atau melalui apa cara lain juga, dihalang daripada mengambil sebarang tindakan dalam apa juga bentuk untuk mengubah nisbah saham di dalam defendan pertama sehingga perbicaraan tindakan ini atau perintah selanjutnya oleh mahkamah yang mulia ini.

A FACTUAL BACKGROUND

[3] The first defendant was incorporated as a private limited company on 24 September 1999 with initially four shareholders namely first plaintiff, second plaintiff, third defendant and fourth defendant. The second, fifth, sixth, and seventh defendants become shareholders of the first defendant after the incorporation. The sixth and seventh defendants were holding shares on trust for the eighth defendant. The ninth and tenth defendants were the secretaries of the first defendant.

[4] The first defendant's memorandum and articles of associations states that the first defendant's principal activities are 'building and road construction contractors, builders, carpenters, general decorators, civil, electrical and mechanical engineering'.

[5] The second defendant was awarded a contract by Jabatan Kerja Raya, Selangor (JKR) for a project called 'Cadangan Kerja-Kerja Ubahsuai dan Tambahan Defendan melibatkan State Banquet Hall, Ruang Tamu Utama, Ruang Buffet, Foyer, Dapor, Dewan DiRaja, Pejabat Tuanku dan Kerja-Kerja Berkaitan diIstana Alam Shah, Kelang' (Main Contract). The second defendant had on 18 September 2000 subcontracted the Main Contract to the first defendant. The total sum for the Main Contract was RM70 million, nevertheless, the said sum was increased to RM75.5 million, which included an element of acceleration, where JKR (as the Employer) had agreed to pay an additional sum of RM5.5 million to the second defendant if the second defendant completes the constructions on or before 6 January 2002. The first defendant did not complete the said project on or before 6 January 2002 and therefore the sum of RM5.5 million was removed by JKR.

[6] The first plaintiff, at all material times, was the managing director of the first defendant. The first plaintiff and second plaintiff were directly involved in the day to day running of the entire project. The first plaintiff was also appointed the first defendant's site agent with the second plaintiff as his assistant.

[7] The first plaintiff and second plaintiff were removed from their respective positions as managing director and site agent (first plaintiff) and assistant site agent (second plaintiff) sometime in March 2002.

[8] By the statements of claim dated 24 September 2002 (encl 1) the plaintiff's claim in brief, against the defendants is one based on the tort of conspiracy by the defendants and breach of agreement by the third to seventh defendants to deprive the plaintiffs of their share in profits to be earned by the first defendant from the said project.

[9] The plaintiff contended that the said project was duly completed and the profits due, which the plaintiff anticipate are in the region of RM20 million, should be distributed based on their ratio of shares in the first defendant. The plaintiffs are afraid that the defendants would to dissipate the monies and deprive the plaintiffs of their shares.

FINDINGS OF THE COURT

[10] The plaintiffs claimed that there was an understanding that the first defendant's company was a partnership between the shareholders and that the company was a single-purpose company and was to be wound-up after completion of the project. The court is of the view that these claims are baseless and not substantiated by any evidence. There is no such indication in the memorandum and articles of association of the first defendant. If that was the arrangement or understanding between the shareholders, then it should have been categorically stipulated in the memorandum or articles of association of the first defendant.

[11] Based on the affidavit evidence, the contention of the plaintiffs that the first defendant is a single-purpose company is flawed. The first defendant's memorandum and articles of associations clearly states that the first defendant's principal activities are 'building and road construction contractors, builders, carpenters, general decorators, civil, electrical and mechanical engineering'. Besides the said project which is the subject matter in the present case, the first defendant had pitched for another contract for a project called 'Design Construction and Completion of Terusan Lencongan Gombak from Ch2430 m to Ch3062 m, Batu Muda'. In relation to that, the first defendant had made payments to Perunding Prima Sdn Bhd for engineering consultancy services for the project. The first plaintiff knew about this fact. The payment was approved by the first plaintiff, whose signature appears on the payment voucher. This clearly shows that the first defendant company is not a single-purpose company as alleged by the plaintiffs.

[12] Is the first defendant company a 'partnership' or 'quasi-partnership'?

[13] A company, incorporated under the Company Act 1965 is defined internally by its memorandum and articles of association (M & A). The M & A is a contract between its members on how the company should function. In the matter before this court, the shareholders (ie the plaintiffs and the defendants) have agreed that the first defendant company be run as stipulated in the M & A of the first defendant. The M & A is considered as 'common law' of the company and one of the most fundamental principles is that 'the majority rules'. Where the parties have agreed to abide by the terms contained in the M & A, the minority cannot complain on the majority rule (see: *Ebrahim v Westbourne Galaries Ltd* [1973] AC 360). If there was such an agreement that the first defendant company was a single-purpose company and was to be wound-up after completion of the Istana project then such understanding or agreements should have been categorically incorporated in the M & A right from beginning during its incorporation. In this context the court is in full agreement with Kang Hwee Gee J in *Beh Chun Chuan v Paloh Medical Centre Sdn Bhd & Ors* [1999] 3 MLJ 262 then he ruled as follows:

A shareholders' agreement is essentially a contract between the members of a company to regulate their conduct and define their duties and obligations inter se in the running of the company (see: *Graham Stedman and Janet Jones 'Shareholders' Agreement* (2nd Ed, Longman)).

However, a shareholders' agreement only creates personal obligations. This principle had been established in the judgment of Lord Davey in *Welton v Suffery* [1895-99] All ER Rep 567 at p 585 and applied more recently in the House of Lord case of *Russell v Northern Bank Development Corp Ltd & Ors* [1992] 3 All ER 161 at p 166 per Lord Jauncey, the relevant passage of which was as follows:

> Of course, individual shareholders may deal with their own interest by contract in such a way as they may think fit. But such contracts, whether made by all or some only of the shareholders, would create personal obligations, or an *exceptio personalis* against themselves only, and would not become a regulation of the company, or be binding on the transferees of the parties to it, or upon new or non-assenting shareholders.

It follows that in order, to ensue that the terms of the shareholders' agreement shall bind the shareholders *inter se* under the Companies Act 1965, it would be necessary to incorporate them into the articles of the company.

[14] On the above principle, the first defendant company cannot be termed or considered as a partnership or quasi-partnership or a single-purpose company as alleged by the plaintiffs.

[15] Further, the first defendant company, when it was incorporated, had four shareholders and later the shareholding went to include the fifth, sixth and seventh defendant. These three additional shareholders came into the picture much later and there is no evidence led by the plaintiff to show that the arrangement that the company be a single-purpose company or a partnership had been intimated to the fifth, sixth and seventh defendants. The fourth defendant in his affidavits averred that there was no such understanding or agreement that the first defendant company was a single-purpose company or a partnership. There is also no evidence to show that the fifth, sixth, and seventh defendants were told or worked as if the first defendant company was a quasi-partnership.

[16] The plaintiffs in this matter have taken a stand that the relationship between the shareholders in the first defendant's company is a kin to a partnership. Such a stand cannot be sustained in the absence of any agreement or such terms incorporated in the M & A of the first defendant. The importance of such terms being incorporated in the M & A had be stressed by Mahadev Shanker JCA in the decision of the Court of Appeal in *Tuan Haji Ishak bin Ismail v Leong Hup Holdings Bhd & other appeals* [1996] 1 MLJ 661 in the following words:

> So far as legitimate expectation is concerned, I need not go into the other cases cited, except to say that Re Tottenham Hotspur plc [1994] 1 BCLC 695 is yet

another instance where the court declined to take cognisance of an alleged private arrangement between two shareholders as to control of a public company. From any point of view, KFCM cannot be regarded as a quasi-partnership between just Leong Hup and Ishak and George Ting or the interest they all alleged to have represented in March 1993. It may be that at the time these people were prepared to leave matters relating to their share ratio and increase of capital in KFCM fluid thus indicating mutual trust and confidence but if they regarded these matters as important, we think it was imperative not only that the agreements on such matters should have been put into writing but also the article of association should have been amended so as to substantiate the claim that is now being made.

[17] Such being the case, the plaintiffs application as per prayer 5 of encl 4 ie that the first defendant be wound-up and provisional liquidator be appointed must fail.

[18] In prayer 5 of the plaintiffs writ (encl 1) as well as in encl 4 (for interlocutory injunction) the plaintiffs have prayed that the first defendant company be wound-up and provisional liquidator be appointed. By this prayer, the plaintiffs are moving this court to wind-up the first defendant company, which in essence, the writ (encl 1) as well encl 4 is a petition to wind-up the first defendant company. In other words, the plaintiffs being the minority shareholders in the first defendant company have in actual fact brought a winding-up petition in a form of a writ and on application for interlocutory injunction. The actual mode that should be employed by the plaintiffs and the proper process should be in the form of a petition under s 181 of the Companies Act 1965. Hence the very form and procedure employed by the plaintiff is wrong and the injunctions sought cannot be granted by this court, as the mode employed is not provided by the rules.

[19] The plaintiffs also claimed that they have personal right to profits in the first defendant company. The court is of the view that all earnings of the first defendant company are property of the first defendant company and it is the of the first defendant company how this property or profits of the first defendant company be dealt with. The plaintiffs are shareholders of the first defendant company. The first defendant company has not declared it's profits. As a matter of fact, the first defendant company is still awaiting payment of moneys from the second defendant as the second defendant has not been paid by JKR or the State of Selangor. The first defendant is still carrying out rectification works on the project under the defect liability period.

[20] The defendants in the affidavit in encl 15 (para 33) say the followings:

33 Merujuk kepada perenggan 18 afidavit pertama, saya ingin mengatakan bahawa sebarang keuntungan yang diperoleh oleh defendan pertama hendaklah diagihkan pada masa dan mengikut kehendak pemegang saham defendan pertama tertakluk kepada prosidur dan undang-undang syarikat defendan-defendan tidak mempunyai niat untuk menjejaskan hak plaintif-plaintif kepada keuntungan syarikat defendan pertama...

[21] This facts clearly shows that the defendants confirm that the plaintiffs are entitled to their profits and the profits shall be distributed at the appropriate time when the shareholders will be paid their dues in time. There has been no indication that the defendants intended to exclude the plaintiffs' of their shares in the profits of the first defendant company. What the plaintiffs seek is their shares in the profits of the first defendant company. The defendants in para 33 of the affidavits have clearly said that the profits will be paid out to all shareholders as they are entitled to it. The defendants are bound to give proper accounting to all shareholders on their profits and loss account.

[22] From the notes of proceedings of this case, the court (Kang Hwee Gee J) had on 26 March 2003 advised the parties as follows:

> Parties are advised by court to work out on a settlement on encl (4) on the basis that all receivables from Selangor State Government in respect of the renovation contract of RM70 million be preserved in a safe place pending trial. First defendant to be at liberty to pay out all out goings from such sums received for the renovation contract.

[23] The defendants have indicated that they are willing to abide by this advice, in particular, that all receivables from project (renovation contract) of RM70 million be preserved in a safe place pending trial. Such being the case, there is no question of the plaintiff's shares in the profits being excluded by the defendants. Therefore the injunction prayed by the plaintiff (in encl 4) is not necessary. In fact the injunction prayed, if granted will cripple the first defendant company. As the relationship between the plaintiffs and the first defendant and it's officers have irretrievably broken down, to place the plaintiffs as signatories in the first defendant would only cause serious irreparable damage to the first defendant. The first defendant has a defect liability period which still continues and is at the present moment still awaiting payments from JKR. Hence it has the obligations and paying contractors their dues. The plaintiffs' interest is only in the money or profits.

[24] The plaintiffs have no interest in the ongoing concerns of the first defendant company. Hence to grant the orders that the plaintiffs seek in this mater will be disastrous to the first defendant and it's shareholders. The very fact that the plaintiffs seek an order that the first defendant be wound-up is sufficient evidence to show that the plaintiffs have no interest in the entity of the first defendant. The first defendant is a going concern and has obligations to JKR where the first defendant has to undertake all rectification works and has also given a defect liability period to the second defendant in respect of the Istana project.

[25] Enclosure 21 relates to the plaintiffs application for interlocutory injunction restraining the defendants from taking any action to alter the equity of the first defendant company by increasing its paid-up capital. Again, this is an internal affairs of the first defendant company. If the majority of the shareholders have decided to increase the paid-up capital of the first defendant company

for reasons best suited the first defendant company, then the court should be slow to interfere unless there are elements of oppression, fraud or conspiracy.

[26] In the present case, the financial position of the first defendant company demanded the increase in the paid-up capital. The requests for the increase were all occasioned by demands made by subcontractors on the first defendant for worked done. The first defendant had not been paid for the work done under the project. The second defendant has not been paid by JKR. The plaintiffs were well aware when they were in control of the project that the payments from the employer (JKR) were very slow or at times no payments were made by JKR at all. In their affidavits the defendants positively state that the total sum of about RM7,706,585.56 is due and payable to the subcontractors. Nevertheless, the paid-up capital of the first defendant is only RM10,000 and the advances given by the shareholders amount to RM2,017,500. Therefore, the first defendant was financially incapable to sustain the business if there was no aid in the form of finance to the first defendant. On the count of advances by the shareholders, it is to be noted that the first plaintiff had failed to make the advances in accordance with his shareholding in the first defendant. It is the stand of the first defendant that the exercise to increase the paid-up capital was absolutely necessary to keep the first defendant a going concern. Further, if the call for capital was not done and taking into consideration that payments had not been received for works done from JKR, the first defendant had threats of legal suits from the subcontractors and other creditors. Hence the call for increase in the paid-up capital is absolutely necessary. The auditors, Ernst & Young have indicated that there was a real need for the call for the increase in the paid-up capital of the first defendant.

[27] Even though the Istana project is practically completed (as alleged by the plaintiffs) but since the payments from the employer (JKR) or the Selangor State Government was not forthcoming, the subcontractors who had contributed in the constructions of the project were demanding for their payments. Therefore, the first defendant had obligations to it's subcontractors. Because of the first defendant's incapability to pay the subcontractors, the subcontractors had refused to carry out rectification works as requested by the second defendant and the employer (JKR). Due to this failure JKR had instructed the second defendant to appoint third party contractors to rectify the defects. This would have caused greater loss to both the first defendant and second defendant.

[28] The second defendant had taken all steps to try and obtain the payments from the JKR. The second defendant had written various letters to JKR followed by meetings and discussions with the relevant authorities for the payment. Despite all this request, the payments were not received and the second defendant could not make the necessary payment to the first defendant and in turn the first defendant could not meet it's obligations to its subcontractors.

[29] All this circumstances drove the first defendant to take the steps to call for the increase in the paid-up capital of the first defendant.

[30] It was pertinent that funds be raised for the purposes of keeping the first defendant solvent and as a going concern. Hence the shareholders made the decision to call for the increase in the paid-up capital of the defendants.

[31] Besides that there were moneys due and payable to the Inland Revenue for the assessment year 2001 and 2002. Any failure of the first defendant to settle the outstanding payments to the Inland Revenue would tantamount to a breach of the law. This would expose the first defendant and it's directors to civil suits and further attracted interest and penalties by the first defendant for infringement of the tax laws.

[32] The interim injunction order sought by the plaintiff is only to safeguard their monetary or financial interest in the first defendant company. The defendants had agreed that all receivables from the Selangor State Government in respect of the contract project, as suggested by the previous judge, Kang Hwee Gee J on 26 March 2003, that a sum amounting to RM70 million be preserved in a safe place pending trial. In the mean time the application for the increase in the paid-up capital of the first defendant can proceed. To stop the first defendant company from calling for an increase in the paid-up capital, when the shareholders and the board of directors have agreed, would not be in the interest of the company. The balance of justice requires that the plaintiffs' application under encl 21 should also be dismissed.

CONCLUSION

[33] After going through all the issues raised by the plaintiffs in support of their applications vide encl 4 and encl 21 the court is satisfied that those issues are not triable issues. On that ground alone, the plaintiffs application vide *encl 4 and encl 21* can be *dismissed with costs.*

[34] Even if, the issues are considered as triable issues, the court is satisfied that interlocutory injunction (as in encl 4 and encl 21) should not be granted on the ground that damages in the form of financial remedy as claimed by the plaintiffs would be adequate remedy recoverable at common law. This is the principle enunciated in *American Cynamid Co v Ethicon Ltd* [1975] AC 369, which reads as follows:

> ... the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages is the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunctions should be normally be granted, however strong the plaintiff's claim appeared to be at that state.

[35] The plaintiffs' claim is all about the moneys that are due to them. They have claimed in their statements of claim and in their affidavit that the first defendant company is a single-purpose company, solely to carry out the Istana project. That statement can only be taken to mean, that after completion of the said Istana project, the first defendant company would be liquidated and the profits be shared amongst the shareholders. Clearly what the plaintiffs are interested in is the moneys that are due to them.

[36] To grant the injunction as prayed by the plaintiffs will only cause more hardship to the defendants particularly the first defendant as well as the other subcontractors who are waiting to be paid for their works done in the project. To make the first plaintiff a signatory to the cheque of the first defendant, would cripple the first defendant as it is a well admitted fact that the relationship between the plaintiffs and the first defendants no longer exist. Thus the prayers sought under encl 4 and encl 21 would only damage the economy of the first defendant.

[37] If the plaintiffs succeed at the trial, then they can be compensated with damages. Damages here is an adequate remedy. The defendants had indicated their willingness to preserve all receivables from the Istana project (amounting to RM70 million) in a safe place pending trial. On the other hand, if the Plaintiffs fail in proving their claim, the defendants would suffer irreparable damages and there is no indication to show that the plaintiffs would be in a position to pay for the damages.

[38] Therefore, the court is satisfied that this is not an appropriate case for the injunction to be granted.

[39] Therefore, the plaintiffs' application vide encl 4 and encl 21 is hereby dismissed with costs.

Plaintiffs' applications dismissed with costs.

Reported by AG Kalidas